Tan Leng Choo & Ors v Law Teck Huat

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–841 OF 2004
LOW HOP BING, ABDULL HAMID EMBONG AND WAN ADNAN MUHAMAD JJCA
14 NOVEMBER 2008

Land Law — Restraint on dealing — Caveats — Whether respondent had caveatable interest

Land Law — Sale of land — Contract for sale — Whether there was concluded contract for sale of land — Whether preliminary or preparatory steps taken by parties during negotiations constitutes concluded contract

Land Law — Sale of land — Option — Whether option to purchase was brokerage agreement — Whether option contained implied terms — Whether option could be exercised by paying 10% deposit of purchase price of land — Whether option expired

A plot of land situated at Lot No 1813, Mukim 15, Seberang Perai Tengah ('the land') was jointly owned by the first, second and third appellants/defendants in their capacity as representatives of the estate of Tan Koon Swee, deceased and Tan Yu Lim, deceased. An option dated 1 September 1993 was granted to sell the land. The option that was valid for 122 days and expired on 31 December 1993, was subject to an order of the court that was to be obtained for the sale of the half share of the share that was held in the name of the estate of Tan Koon Swee, deceased. On 21 December 1993 the plaintiff/respondent intimated to the appellants his intention to purchase the land. On 27 December 1993, the administrator of the estate of Tan Koon Swee, deceased acknowledged receipt of this letter and then proceeded to appoint solicitors to act for them in the sale and purchase of the land. When the respondent received a draft of the sale and purchase agreement ('SPA') he incorporated further additional terms to it before returning the same to the appellants. Thereafter on 20 April 1995, without any request from the appellants the respondent sent the appellants a cheque for RM81,693.29, purportedly as the 10% deposit to be paid ('the deposit sum') towards the purchase price of the land. This deposit sum was to be held by the appellants' solicitors as stakeholders, pending approval of the SPA and on the undertaking that it was not to be released until execution of the SPA.

A On 3 May 1995 the appellants returned the cheque for the deposit sum to the respondent stating that they were not bound by the option. Then the respondent again forwarded a new cheque for RM81,693.29 stating that the respondent was now willing to purchase the land. On 15 June 1995, the respondent lodged a private caveat over the land. On 5 December 1996, the B appellants returned the sum of RM86,076.13, being the deposit sum together with interest accrued thereon, to the respondent on the ground that the appellants were not bound to sell the land to the respondent. The respondent then filed a civil suit against the appellants for specific performance of the contract between the respondent and the appellants for C the sale and transfer of the land to the respondent. The appellants filed their respective defences and included a counterclaim for the removal of the private caveat and general damages. When the trial judge allowed the respondent's claim and dismissed the appellants' counterclaim with costs the appellants proceeded by way of this appeal. In their grounds of appeal the first and D second appellants submitted that the option was no more than a brokerage agreement. In addition, the third appellant contended that the option did not say that it could be exercised by the respondent paying the deposit sum, and that in any case the deposit sum was tendered some 16 months after the option had expired. In response the respondent submitted that having regard E to the express and implied terms of the option, the plaintiff had properly and validly exercised the option.

F **Held**, allowing the appeal with costs and setting aside the orders of the High Court with a consequential order for damages to be assessed by the registrar:

(1) The terms expressed in the option were clear, unambiguous and self-evident. As such, there was no room for the respondent to G incorporate implied terms into the option and to treat them as part and parcel thereof, especially when the terms to be implied are established terms which are ordinarily applicable to a sale and purchase agreement and not to an option. It was wrong to construe and treat the option as a SPA or a draft thereof because unlike a SPA the option in question was H an estate agent or brokering agreement. From decided cases, it was clear that the law governing the brokerage agreement contained in the option in this case was fundamentally different from a contract for the sale and purchase of land which was governed by different principles (see paras 36 & 37).

I (2) In the instant appeal the respondent had gone beyond the terms of the option when he unilaterally tendered the deposit sum when such a term was not provided for in the option. Further, even assuming the payment of the deposit sum was an implied term of the option, it was not paid before the validity date ie 31 December 1993. By tendering the cheque

some 16 months after the option had expired the respondent had failed to follow the very term which the respondent sought to imply into the option. In any event, there was no acceptance of the deposit sum as the appellants had returned the same to the respondent. The trial judge had therefore erred in fact and in law in holding that the respondent had exercised the option within the stipulated time by tendering the deposit sum to the appellants on 20 April 1995 (see paras 45–48).

(3) The preliminary or preparatory steps taken by the parties during the negotiations, such as proposals for further and additional terms, could not constitute a concluded contract unless finally agreed upon. Such proposals were a far cry from an unqualified acceptance of an offer as it was essential to have an unqualified offer and acceptance before there could be a concluded contract between the parties. In the instant appeal there was no concluded contract between the appellants and the respondent as they had not achieved a consensus ad idem (see paras 50–53).

(4) Since there was no concluded contract between the parties, relating to the sale and purchase of the land, it followed that no caveatable interest accrued to the respondent. Hence the private caveat had been wrongly entered by the respondent (see para 54).

[Bahasa Malaysia summary

Satu petak tanah yang terletak di Lot No 1813, Mukim 15, Seberang Perai Tengah ('tanah tersebut') adalah dimiliki bersama oleh perayu-perayu/defendan-defendan pertama, kedua dan ketiga di dalam kapasiti mereka sebagai wakil-wakil estet Tan Koon Swee, si mati dan Tan Yu Lim, si mati. Satu opsyen bertarikh 1 September 1993 telah diberikan untuk menjual tanah tersebut. Opsyen tersebut adalah sah untuk 122 hari dan luput pada 31 Disember 1993, adalah tertakluk kepada satu perintah mahkamah yang perlu diperolehi untuk penjualan saham separuh daripada saham yang dipegang di bawah nama estet Tan Koon Swee, si mati. Pada 21 Disember 1993 plaintif/responden memberitahu kepada perayu-perayu niatnya untuk membeli tanah tersebut. Pada 27 Disember 1993, pentadbir estet Tan Koon Swee, si mati mengesahkan penerimaan surat ini dan kemudiannya meneruskan untuk melantik peguamcara untuk bertindak bagi pihak mereka dalam penjualan dan pembelian tanah tersebut. Apabila responden menerima draf perjanjian jual beli ('PJB') tersebut dia memasukkan selanjutnya terma-terma tambahan kepadanya sebelum memulangkannya kepada perayu-perayu. Kemudiannya pada 20 April 1995, tanpa sebarang permintaan daripada perayu-perayu responden menghantar cek untuk sejumlah RM81,693.29 kepada perayu-perayu, kononnya sebagai deposit 10% untuk dibayar ('jumlah deposit') kepada harga pembelian tanah

tersebut. Jumlah deposit ini adalah dipegang oleh peguamcara perayu-perayu sebagai pemegang saham, sementara menunggu kelulusan PJB tersebut dan di atas akujanji bahawa ia tidak akan dikeluarkan sehingga pelaksanaan PJB tersebut. Pada 3 Mei 1995 perayu-perayu mengembalikan cek bagi jumlah deposit tersebut kepada responden menyatakan bahawa mereka tidak terikat dengan opsyen tersebut. Responden kemudiannya menghantar lagi satu cek baru untuk sejumlah RM81,693.29 menyatakan responden sekarang sanggup membeli tanah tersebut. Pada 15 Jun 1995, responden mengemukakan satu kaveat persendirian ke atas tanah tersebut. Pada 5 Disember 1996, perayu-perayu mengembalikan jumlah sebanyak RM86,076.13, yang merupakan jumlah deposit bersama faedah terakru, kepada responden berdasarkan bahawa perayu-perayu tidak terikat untuk menjual tanah tersebut kepada responden. Responden kemudiannya memfailkan satu guaman sivil terhadap perayu-perayu untuk pelaksanaan spesifik kontrak di antara responden dan perayu-perayu untuk penjualan dan pemindahan tanah tersebut kepada responden. Perayu-perayu memfailkan pembelaan masing-masing dan memasukkan satu tuntutan balas untuk pembuangan kaveat persendirian tersebut dan ganti rugi am. Apabila hakim membenarkan tuntutan responden dan menolak tuntutan balas perayu-perayu dengan kos, perayu-perayu meneruskan melalui rayuan ini. Di dalam alasan-alasan rayuan mereka perayu-perayu pertama dan kedua menghujah bahawa opsyen tersebut tidak lebih daripada satu perjanjian pembrokeran. Sebagai tambahan, perayu ketiga berhujah bahawa opsyen tersebut tidak menyatakan yang ia boleh dilaksanakan oleh responden dengan membayar jumlah deposit tersebut, dan dalam sebarang hal jumlah deposit itu ditender lebih kurang 16 bulan selepas opsyen tersebut luput. Di dalam menjawab responden berhujah bahawa setelah mengambilkira terma-terma nyata dan tersirat opsyen tersebut, plaintif telah secara betul dan sah melaksanakan opsyen tersebut.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah Mahkamah Tinggi dengan perintah lanjutan untuk ganti rugi ditaksir oleh pendaftar:

(1) Terma-terma yang dinyatakan di dalam opsyen tersebut adalah jelas, tidak samar dan nyata. Oleh itu, tidak terdapat ruang bagi responden untuk memasukkan terma-terma tersirat ke dalam opsyen tersebut dan untuk menganggap terma-terma tersebut sebagai sebahagian daripadanya, terutamanya apabila terma-terma yang akan disiratkan adalah terma-terma yang sudah mantap yang biasanya diterimapakai kepada satu perjanjian jual beli dan bukan kepada satu opsyen. Adalah salah untuk menafsirkan dan menganggap opsyen tersebut sebagai satu PJB atau satu draf kerana tidak seperti PJB, opsyen yang dipersoalkan itu adalah ejen estet atau perjanjian pembrokeran. Daripada kes-kes

yang telah diputuskan, ia adalah jelas bahawa undang-undang yang mengawal perjanjian pembrokeran yang terkandung di dalam opsyen tersebut di dalam kes ini adalah secara asasnya berbeza daripada satu perjanjian jual beli tanah yang dikawal oleh prinsipal-prinsipal yang berbeza (lihat perenggan 36 & 37).

(2) Di dalam rayuan ini responden telah melangkau melebihi terma-terma opsyen tersebut apabila dia secara satu pihak meletakkan jumlah deposit tersebut apabila terma sedemikian tidak diberikan di dalam opsyen tersebut. Tambahan lagi, walaupun dengan menganggap pembayaran jumlah deposit tersebut adalah satu terma tersirat opsyen tersebut, ia tidak dibayar sebelum tarikh sah iaitu 31 Disember 1993. Dengan memberikan cek tersebut lebih kurang 16 bulan selepas opsyen tersebut telah luput responden telah gagal untuk mematuhi terma yang dipohon responden untuk ditafsirkan ke dalam opsyen tersebut. Walau bagaimanapun, tidak terdapat penerimaan jumlah deposit tersebut kerana perayu-perayu telah memulangkannya kepada responden. Hakim perbicaraan oleh itu telah terkhilaf dalam fakta dan undang-undang dalam memutuskan bahawa responden telah melaksanakan opsyen tersebut dalam tempoh masa yang diberikan dengan memberikan jumlah deposit tersebut kepada perayu-perayu pada 20 April 1995 (lihat perenggan 45–48).

(3) Langkah-langkah awal atau persediaan yang diambil oleh pihak-pihak tersebut semasa rundingan, seperti cadangan untuk terma-terma lanjutan dan tambahan, tidak boleh membentuk satu kontrak yang telah disempurnakan kecuali akhirnya ia dipersetujui. Cadangan-cadangan tersebut adalah jauh berbeza daripada satu penerimaan tanpa syarat kepada satu tawaran kerana ia adalah mustahak untuk mendapatkan tawaran dan penerimaan tanpa syarat sebelum boleh terjadinya satu kontrak yang telah disempurnakan di antara pihak-pihak tersebut. Di dalam rayuan ini tidak terdapat kontrak yang telah disempurnakan di antara perayu-perayu dan responden kerana mereka tidak mencapai satu consensus ad idem (lihat perenggan 50–53).

(4) Memandangkan tidak terdapat kontrak yang telah disempurnakan di antara pihak-pihak tersebut, oleh itu tiada kepentingan kaveat terakru kepada responden. Oleh itu kaveat persendirian tersebut telah dimasukkan secara salah oleh responden (lihat perengan 54).]

Notes

For a case on contract for sale, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) para 4018.

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

For cases on option, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4107–4123.

Cases referred to

Chartered Bank v Yong Chan [1974] 1 MLJ 157, FC (refd)
Elizabeth Jeevamalar Ponnampalam & Ors v Karuppannan Ramasamy & Anor (Sundram a/l Marappa Goundan & Anor as interveners; Raya Realty (sued as third party) [2007] 4 MLJ 214; [2007] 3 CLJ 405, CA (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ 45, CA (refd)
Hashim bin Abu Hassan (suing as the legal parent and dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors [2006] 1 MLJ 297, HC (refd)
Ho Kam Phaw v Fam Sin Nin [1998] 2 MLJ 713; [1998] 3 CLJ 708, CA (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)
Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39, FC (refd)
New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd [1996] 4 CLJ 94, HC (refd)
Ponnukon v Jebaratnam [1980] 1 MLJ 282, FC (refd)
Ria Enterprise & Ors v MBf Finance Bhd [2001] 1 CLJ 687, HC (refd)
Sudbrook Trading Estate Ltd v Eggleton [1982] 3 All ER 1, HL (refd)
Tong Lee Hua v Yong Kah Chin [1981] 1 MLJ 1, PC (refd)
Tong Lee Hua v Yong Kah Chin [1979] 1 MLJ 233, FC (refd)
Voo Syun Mui v Yap Mooi Mooi [1984] 2 MLJ 48, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Appeal from: Civil Suit No 22–251 of 1997 (High Court, Pulau Pinang)

Hardeep Singh (Richard Huang with him)(Peter Huang & Richard) for the first and second appellants.
Daphne Choy (Choy & Associates) for the third appellant.
Darshan Singh (V Arivanandhan with him)(Cheong Wai Meng & Van Buerle) for the respondents.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal is lodged by the appellants ('the defendants') against the judgment of the learned High Court judge ('the trial judge') who had allowed

the respondent's ('the plaintiff's') claim and dismissed the defendants' respective counterclaim, with costs.

FACTUAL BACKGROUND

[2] An option dated 1 September 1993 ('the option') was granted to one Law Ah Ow, deceased ('the option holder') to sell the land known as Lot No 1813, Mukim 15, Seberang Perai Tengah ('the land') at RM1.80 per sqft. The land was jointly owned by the first appellant ('the first defendant'), the second appellant ('the second defendant') as representative of the estate of Tan Koon Swee, deceased, and the third appellant ('the third defendant') as representative of the estate of Tan Yu Lim, deceased.

[3] The option was valid for 122 days and expired on 31 December 1993. It was subject to an order of the court which was to be obtained for the sale of the half share held in the name of the estate of Tan Koon Swee, deceased.

[4] On 21 December 1993, the plaintiff, the option holder's son, vide solicitors' letter conveyed his intention to purchase the land.

[5] On 27 December 1993, Tan Koon Seng (the administrator of the estate of Tan Koon Swee, deceased) acknowledged receipt of the letter of the plaintiff's solicitors and confirmed that he has appointed solicitors Messrs Lim Cheng Chuan & Co ('the defendants' solicitors') to act for him in the sale and purchase of the land.

[6] On 15 February 1994, the defendants' solicitors forwarded a draft sale and purchase agreement ('the draft SPA') to the plaintiff's solicitors.

[7] On 10 March 1994, the defendants' solicitors wrote to the plaintiff's solicitors requiring the return of the draft SPA within seven days from the date thereof.

[8] On 11 March 1994, the plaintiff's solicitors returned the draft SPA, incorporating further additional terms.

[9] On 10 June 1994, Tan Koon Seng (the administrator of Tan Koon Swee, deceased) died.

[10] On 20 March 1995, the plaintiff's solicitors wrote to the defendants' solicitors, proposing yet further and additional terms to the draft SPA.

[11] On 20 April 1995, without any request from the defendants, the plaintiff through his solicitors sent a cheque for RM81,693.29 to the defendants' solicitors, purportedly as 10% deposit sum ('the deposit sum') towards the purchase price of the land. That deposit sum was to be held by the defendants' solicitors as stakeholders, pending approval for the draft SPA, and on the undertaking by the defendants' solicitors not to release the same to the defendants until execution of the sale and purchase agreement ('SPA') by the parties.

[12] On 3 May 1995, the defendants' solicitors wrote to the plaintiff's solicitors stating that the defendants are not bound by the option and returned the cheque to the plaintiff's solicitors.

[13] Vide letters dated 29 May 1995 and 6 July 1995, the plaintiff's solicitors forwarded a new cheque for RM81,693.29 to the defendants' solicitors stating that the plaintiff is willing to purchase the land.

[14] On 15 June 1995, the plaintiff lodged a private caveat over the land ('the private caveat').

[15] On 5 December 1996, the defendants' solicitors returned a sum of RM86,076.13 being the deposit sum together with interest accrued thereon, to the plaintiff's solicitors, on the ground that the defendants are not bound to sell the land to the plaintiff.

[16] Vide solicitors' letter dated 17 December 1996, the plaintiff disputed the defendants' stand and gave notice that he would be filing a claim for specific performance against the defendants.

[17] On 18 June 1997, the plaintiff filed Civil Suit No 22–251 of 1997 in the Penang High Court against the defendants and prayed, inter alia, for specific performance of the contract between the plaintiff and the defendants for the sale and transfer of the land to the plaintiff.

[18] The defendants filed their respective defence, and included a counterclaim for the removal of the private caveat and general damages.

[19] The trial judge allowed the plaintiff's claim and dismissed the defendants' counterclaim, with costs.

[20] Hence, this appeal by the defendants.

AGREED ISSUES FOR DETERMINATION

[21] The parties, in the High Court and now in this court, agree that the issues for determination are:

(1) Was there a concluded contract between the parties for the sale and purchase of the land ('the contract')? ('agreed issue(1)') and

(2) Was the plaintiff's private caveat wrongly entered? ('agreed issue (2)').

DECIDING ON NON-AGREED ISSUE

[22] In the submission for the first and second defendants, learned counsel Mr Hardeep Singh (assisted by Mr Richard Huang) alluded to the trial judge's misdirection that 'the only issue is whether there is a valid option existing' ('non-agreed issue') when agreed issue (1) was whether there was a concluded contract between the parties.

[23] Ms Daphne Choy, learned counsel for the third defendant, is of the same mind. She stressed that even learned counsel Mr Darshan Singh (Mr V Arivanandhan with him) had submitted for the plaintiff that the pertinent issue for determination was agreed issue (1).

[24] We have had the opportunity of perusing the judgment of the trial judge. In the first paragraph, His Lordship stated the non-agreed issue as the only issue for determination by him. The tenor of the entire judgment was premised on the non-agreed issue. The trial judge proceeded to grant the decree of specific performance of the contract, together with consequential orders and costs.

[25] The immediate question that merits consideration under this head is whether the trial judge is correct in deciding on the non-agreed issue, instead of agreed issue (1).

[26] In our judgment, the answer may be achieved by an analytical approach to the pleadings.

[27] Paragraphs 6.1, 6.2 and 7.1 of the plaintiff's amended statement of claim contain averments relating to the express terms of the option. Paragraphs 7.2 and 7.3 thereof consist of averments purporting to include in the option the following implied terms viz:

(1) A sum of RM81,963.29 representing 10% of the total purchase price of RM816,932.95 to be deposited in the account of the plaintiff's

solicitors upon the plaintiff's exercise of the option; and to be paid to solicitors of the option grantors ('the defendants') upon execution of the sale and purchase agreement, and the balance of the purchase price in the sum of RM735,239.66 to be paid within a reasonable period from the date of obtaining the order of the court for the sale of the half share held in the name of the estate of Tan Koon Swee, deceased: para 7.2; and

(2) Upon full payment of the purchase price, the option grantors (the defendants) shall execute a valid and registrable transfer of title to the plaintiff or his nominee(s): para 7.3.

[28] An objective and proper perusal of the plaintiff's statement of claim would put in place the plaintiff's case. The plaintiff was relying on the express and 'implied' terms of the option. The plaintiff's prayer for specific performance was expressly related to the draft SPA. The plaintiff's approach is apparently ambivalent, the focus being on the option as well as the SPA. The decision of the High Court deals with the option and the conclusion is on the SPA. It is trite law that parties are bound by their own pleadings and that a party stands or falls by the four corners of his pleadings: *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; and *Hashim bin Abu Hassan (suing as the legal parent and dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors* [2006] 1 MLJ 297. The court shall only decide on issues which were pleaded and not otherwise: *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 (CA); *Chartered Bank v Yong Chan* [1974] 1 MLJ 157; and *Ria Enterprise & Ors v MBf Finance Bhd* [2001] 1 CLJ 687. In the instant appeal, the decision of the High Court relating to the option and the SPA is within the pleadings. We therefore hold that there is no manifest error under this head.

[29] The merits of this appeal deserve consideration now.

THE OPTION

[30] It was submitted for the first and second defendants that the option is no more than a brokerage agreement. Support was sought in:

(1) *Ponnukon v Jebaratnam* [1980] 1 MLJ 282 (FC);

(2) *Tong Lee Hua v Yong Kah Chin* [1979] 1 MLJ 233 (FC); and

(3) *Tong Lee Hua v Yong Kah Chin* [1981] 1 MLJ 1 (PC).

[31] The contention for the third defendant added that:

(1) The option does not say that it can be exercised by the plaintiff paying the deposit sum to the defendants' solicitors; and

(2) In any event, the deposit sum was tendered on 20 April 1995, some 16 months after the option had expired on 31 December 1993.

[32] In response, the plaintiff subscribed to the view that having regard to the express and 'implied' terms of the option, the plaintiff had properly and validly exercised the option by informing the defendants of the intention to purchase the land; by paying the deposit sum and awaiting the SPA from the defendants' solicitors. Reference was made to:

(1) *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39;

(2) *Voo Syun Mui v Yap Mooi Mooi* [1984] 2 MLJ 48; and

(3) *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1.

[33] The trial judge held that the plaintiff had exercised the option *within the stipulated time* by tendering the deposit sum and the option was clearly intended by both parties to have legal effect, to create legally enforceable rights and obligations and the parties must therefore be bound by their intention. In arriving at the decision, the trial judge has apparently accepted the plaintiff's submission on the 'implied' terms pertaining to the payment of the deposit sum, the balance of the purchase price and the execution of a valid and registrable transfer of title to the plaintiff.

[34] In our judgment, a good starting point is to refer to the option in its original words:

> In consideration of the sum of one dollar ($1) only paid by you Law Ah Ow (I/C No. 1552145 of No. 1328 Kampong Alma, Bukit Mertajam 14000, Seberang Prai Tengah, Pulau Pinang) (the receipt of which sum we hereby acknowledge), we hereby give you an option to sell all the shares in Lot 1813 Mukim 15 Province Wellesley Central at a price of $1.80 per square foot without vacant possession subject to Order of Court being obtained for the sale of ½ share in the name of Estate of Tan Koon Swee, deceased.
>
> In the event of sale by you, we hereby agree to give you a commission of 2% on the total sale price.
>
> The option is valid for a period of 122 days effective from 1st day of September 1993 to the 31st day of December 1993 (both dates inclusive).
>
> Dated 1st. day of September, 1993.
>
> Sgd

A …

Administrator of the Est.

Of Tan Koon Swee, deceased.

B

Sgd	Sgd
...	...
Tan Long Choo	Tan Yu Lim

16/8/93

C

[35] An account of the option has already been given in [2] and [3] above, and would require no repetition here.

D **[36]** Our courts have in several judgments considered and explained the nature and effect of this specific type of option. Illustrations are provided in:

(1) *Ponnukon*, where an option was given to the appellant to sell land at a commission of 2%. The option was valid for one year. At pp 285–286, Salleh Abas FJ (later LP), speaking for the Federal Court, held that the E option was not to buy but to sell ie to act as a broker in order to find a buyer, and the appellant who had obtained an option to sell the land was the vendor's agent, whose duty was to look for a buyer;

(2) *Tong Lee Hua*, where an option valid for five days was given to the F plaintiff to sell land at RM65,000 per acre, and a commission was payable upon successful conclusion of the sale within the five days. The High Court, the Federal Court and the Privy Council held that upon successful conclusion of the sale within the validity period, the plaintiff is entitled to summary judgment on the commission; and

G (3) *Elizabeth Jeevamalar Ponnampalam & Ors v Karuppannan Ramasamy & Anor (Sundram a/l Marappa Goundan & Anor as interveners; Raya Realty (sued as third party)* [2007] 4 MLJ 214; [2007] 3 CLJ 405, (CA), where Zulkefli Ahmad Makinudin JCA (now FCJ) held that an option is a unilateral contract which does not become binding on its grantor until H the exact terms thereof are complied with.

[37] From the above authorities, it can be discerned that the law governing the brokerage agreement contained in the option in question is trite and is I fundamentally different from a contract for the sale and purchase of land which is governed by different principles.

[38] In the instant appeal, the terms expressed in the option are clear, unambiguous and self-evident. There is no room for the plaintiff to

incorporate implied terms into the option, and to treat them as part and parcel thereof, especially when the terms to be implied are established terms which are ordinarily applicable to a sale and purchase agreement and not to an option. It is wrong to construe and treat the option as a sale and purchase agreement, or a draft thereof. Unlike a sale and purchase agreement, the option in question is an estate agent or brokering agreement.

[39] We shall now examine the usefulness or otherwise of the authorities cited for the plaintiff, as follows:

(1) In *Lim Keong Siong*, the appellant wrote to estate agents on 1 March 1976 confirming, subject to contract, to sell the property there at $5.40 per sqft in Singapore currency, the sale and purchase to be completed latest by 24 March 1976. Subsequent to negotiations, the estate agents wrote on 3 March 1976 to confirm the sale at $5.20 per sq ft. The appellant refused to complete the agreement. In the High Court, Wan Yahya J (later SCJ) granted specific performance of the agreement. On appeal, it was affirmed by the Federal Court, holding that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale, and a legally binding and enforceable agreement was concluded on 3 March 1976. We note that this authority concerns the specific performance of a sale and purchase agreement. The judgments of the High Court and the Federal Court do not decide on the nature and effect of a brokerage agreement expressed in an option to sell land, such as in the instant appeal.

(2) *Lim Keng Siong*, was applied in *Voo Syun Mui*, where the appellant gave the respondent the option to purchase her property in Kuala Lumpur. The respondent exercised the option by letter delivered to one Teo at the appellant's house. Subsequently, the letter was returned to the respondent. The decision of Wan Hamzah J (later SCJ) granting specific performance was affirmed by the Federal Court. We are of the view that two distinguishing features are identifiable viz:

   (a) the option in *Voo Syun Mui*, was given direct to the purchaser and it was not a brokerage agreement. However, in the instant appeal, the option is a brokerage agreement, and

   (b) the second and more important distinguishing feature is that the option in *Voo Syun Mui*, has been exercised within the validity period thereof. In the instant appeal, even assuming that the payment of the deposit sum can be accepted as an 'implied term' of the option, the exercise thereof by the plaintiff paying the deposit sum on 20 April 1995 took place 16 months after the shelf life of the option.

A (3) In *Sudbrook Trading Estate*, the option was granted to the lessee to purchase the reversion in fee simple of the land there. It is not an option in the form of a brokerage agreement, as found in the instant appeal. Hence, different considerations were applied there.

B

[40] In the circumstance, the aforesaid authorities are not useful to the plaintiff.

ANY CONCLUDED CONTRACT?

C

[41] The first and second defendants relied on *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713; [1998] 3 CLJ 708 (CA); and *New Selangor Plantations Sdn Bhd v Talam Management Services Sdn Bhd* [1996] 4 CLJ 94 (HC), to support their submission that the facts do not constitute a concluded contract.

D

[42] The third defendant took the same position, and cited *Elizabeth Jeevamalar*.

E

[43] The plaintiff's contention is that there was a concluded contract for the sale and purchase of the land between the parties, and sought to distinguish *Elizabeth Jeevamalar*.

F

[44] We would first consider *Elizabeth Jeevamalar*. There, the appellants were the owners of about 12.5 acres of land, and had given an estate agent (the third party) an option to sell it at RM30,000 per acre. The respondents and interveners claimed to have purchased the land at RM28,000 per acre. However, they have not paid the 10% of the purchase price within the required time frame and there was no acceptance thereof by the appellants. In the High Court, they sought specific performance for the sale of the land. The appellants counterclaimed for the removal of the caveat lodged by the respondents and issued a third party notice of indemnity against the third party in respect of the action against them. The trial judge granted, inter alia, specific performance. The Court of Appeal allowed the appellants' appeal and set aside the specific performance on the ground, inter alia, that there was no concluded contract. We are of the view that the judgment of the Court of Appeal militates against the contention presented for the plaintiff.

G

H

I

[45] Reverting to the mainstream in the instant appeal, the plaintiff had actually travelled beyond the terms of the option by the unilateral tender through his solicitors of the cheque for the deposit sum to the defendants' solicitors when the option did not provide for it.

[46] Further, as alluded to above, even by assuming that the payment of the deposit sum is an implied term of the option, it was not paid before the validity date ie 31 December 1993. By tendering the cheque 16 months later, on 20 April 1995, the plaintiff had actually failed to follow the very term which the plaintiff sought to imply into the option, as the option remained valid only until 31 December 1993.

[47] With respect, the trial judge had therefore erred in fact and in law in holding that the plaintiff had exercised the option within the stipulated time by tendering the deposit sum to the defendants' solicitors for the first time on 20 April 1995.

[48] In any event, there was no acceptance of the deposit sum as the defendants' solicitors had on 3 May 1995 returned it to the plaintiff's solicitors.

[49] Although the plaintiff's solicitors had once again forwarded a new cheque for the sum of RM81,693.29 to the defendants' solicitors purportedly as the deposit sum, the same was returned to the plaintiff's solicitors by the defendants' solicitors on 5 December 1996. There was obviously no acceptance thereof by the defendants. Further, vide letters dated 3 May 1995 and 5 December 1996, the defendants' solicitors had also informed the plaintiff's solicitors that negotiations for the sale of the land with the plaintiff were not to be proceeded with.

[50] Preliminary or preparatory steps, such as proposals for further and additional terms, taken during negotiations for the purpose of achieving consensus ad idem, unless finally agreed upon, cannot constitute a concluded contract. It is essential to have an unqualified offer and acceptance. Such proposals are a far cry from an unqualified acceptance of an offer. This was shown in *New Selangor Plantations Sdn Bhd*. The relevant facts are:

(1) By a letter dated 15 March 1995, the defendant had offered to purchase the plaintiff's land at RM34,000 per acre, the price to be paid within three years from the date of the sale and purchase agreement. This was rejected by the plaintiff. On 23 March 1995, both the parties met and the defendant increased its offer to RM35,000 per acre. The plaintiff accepted the increase and confirmed the same by a letter dated 27 March 1995 which, amongst other salient terms, provided for 'such terms and conditions as shall be determined or advised by our solicitors in transactions of this nature'.

(2) On 31 March 1995, the plaintiff's solicitors forwarded a draft sale and purchase agreement incorporating the basic terms agreed upon. The

defendant's solicitors responded with a letter dated 11 April 1995 making various amendments, variations, counter-proposals, alterations, additions, and deletions.

(3) The changes made were not acceptable to the plaintiff and disputes arose, leading the defendant to lodge several private caveats against the plaintiff's land.

(4) The plaintiff subsequently initiated proceedings praying for, inter alia, a declaration that there was no concluded contract for the sale of the land, and for an order that all the private caveats entered by the defendant against the land be removed. The defendant contended that there was a contract between the parties.

[51] I rejected the defendant's contention there and held that there was no concluded contract between the parties. Consequently, no caveatable interest accrued to the defendant there. The letter from the defendant dated 11 April 1995 did not constitute an absolute or unqualified acceptance of the terms and conditions offered by the plaintiff in the draft sale and purchase agreement.

[52] The immense importance of due execution of a written agreement to establish the formation of a legally binding transaction is demonstrated in *Ho Kam Phaw*. There, the parties were the two partners in a firm of solicitors and had agreed to achieve a settlement agreement which was prepared by another firm of solicitors ('the drafting solicitors'). The first draft was handed by the respondent to the appellant for approval, but was returned to the drafting solicitors for amendment. The amended draft ('the second draft') was sent to the appellants' solicitors who proposed minor changes to it. The appellant executed four copies of the second draft and forwarded them to the respondent whose solicitors wrote to the appellants' solicitors protesting that the changes were not agreed to by the respondent and that any amendment should be carried out by the drafting solicitors. The second draft was sent to the drafting solicitors for comment by the respondent. The drafting solicitors subsequently faxed the draft agreement ('the faxed draft') to the appellant who photostated the faxed draft, signed and returned it to the respondent. The core issue was whether the faxed draft constituted a concluded agreement. The High Court gave the answer in the negative. On appeal, the Court of Appeal, by a majority, also held that the faxed draft did not constitute a concluded agreement, on the grounds, inter alia, that:

(1) In a situation where one party intends to contract with another party by a document which each of them will be required to sign, nothing short of signing the document by both parties can bring a contract into existence; and

(2) The rule is that even though the terms to be included in the documents have been agreed, there is no contract and each party has a *locus poenitentiae* (a chance to withdraw before becoming legally committed) until at least execution on both sides. The faxed draft was not a concluded contract because the respondent had not signed it.

[53] In the circumstances, we find that there was no concluded contract between the plaintiff and the defendants in the instant appeal.

PRIVATE CAVEAT

[54] The answer to agreed issue (1) would also resolve agreed issue (2). There can be no cavetable interest when there is no concluded contract relating to the sale and purchase of the land. Hence, the private caveat has been wrongly entered.

CONCLUSION

[55] The answer to agreed issue (1) is in the negative, while that to agreed issue (2) is in the affirmative. The decision of the trial judge is unsustainable, both in fact and in law. This appeal is therefore allowed with costs, here and below, and the orders of the High Court set aside. The private caveat is hereby removed, with a consequential order that damages be assessed by the registrar of the court below, and be paid by the plaintiff to the defendants.

Appeal allowed with costs.

Reported by K Nesan